No. 1018

Office Supreme Court, U.S.
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JAMES T. FEY, Clerk

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12515

THE MANUFACTURERS LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

against

ALBERT BARNETT KLEPPER and EDWARD SCHNUR,

Defendants-Appellants,

and

TANNER ASSOCIATES, INC.,

Defendant-Appellee,

and

MARIE M. CONSTANT,

Defendant.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Sat Below: Wortendyke, Jr., U.S.D.J.

BRIEF AND APPENDIX FOR DEFENDANT-APPELLEE, TANNER ASSOCIATES, INC.

ABE A. SCHULTZ,
Attorney and Counsel for Defendant-Appellee, Tanner Associates, Inc.,
880 Bergen Avenue,
Jersey City, New Jersey.

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Letter of February 8, 1956, Annexed to Affidavit Submitted by Defendant Tanner Associates, Inc. 1a

Counter-Statement of Questions Involved

1. Did the District Court of New Jersey properly assume jurisdiction in this action of interpleader after the institution of an action by attachment, by one of the defendants-appellants herein, against the plaintiff in interpleader, in the Supreme Court of New York on the obligation which is the subject of the interpleader?

2. Under the Federal Interpleader Act does the District Court of New Jersey have jurisdiction over New York residents?

3. Where, after the complaint in interpleader was filed and a restraint issued, did the District Court properly overrule the objections to its jurisdiction by 3 of the 4 defendants who agreed to make a conditional payment to the fourth defendant of its interest in the fund?

Counter-Statement of the Case

For a correct understanding of the position of the defendant, Tanner Associates, Inc. with reference to the proceeds of the insurance policy which is the subject of this litigation, a comprehensive statement of the relations of the parties hereto with the insured is necessary.

On July 22, 1953, the plaintiff-appellee, The Manufacturers Life Ins. Company, issued its policy No. 1,254,339 in the face amount of $25,000.00 on the life of Menander T. Constant as insured. Marie M. Constant, the wife of the said Menander T. Constant, and one of the defendants herein, was named revocable beneficiary thereof.

On October 28, 1955, Hadji Realty Corporation, a New Jersey corporation, being indebted to Edward Schnur, one of the defendants-appellants herein, in the sum of $28,000.00 delivered to him a first mortgage, in that amount, covering a parcel of real estate in the Township of Ocean, Monmouth County, New Jersey.

At this time, and up until the time of his death, the said Menander T. Constant was the President, and the said Marie M. Constant was the Secretary of Hadji Realty Corporation, and between them they owned substantially all the stock of said corporation.

On January 6, 1956 the said Hadji Realty Corporation conveyed, by deed, its interest in the aforementioned property, on which the defendant-appellant, Schnur, was given the mortgage, to Elberon Estates, Inc., a New Jersey corporation. The said Menander T. Constant was the President and the said Marie M. Constant was the Secretary of said Elberon Estates, Inc. and between them they owned substantially all the stock of said corporation.

On February 8, 1956, the said Elberon Estates, Inc., being indebted to Abraham Weiner and Tillie Weiner in the

sum of $10,000.00 executed and delivered to them, to secure such debt, a second mortgage on the aforementioned property in Ocean Township, Monmouth County, New Jersey. The said Menander T. Constant and the said Marie M. Constant personally guaranteed the payment of such debt to the Weiners.

On the same day, February 8, 1956, for good consideration, the said Menander T. Constant revoked the appointment of Marie M. Constant as beneficiary of the above mentioned insurance policy and in her place and stead appointed the defendant, Edward Schnur, "as first mortgagee".

On the same day, February 8, 1956, the said Menander T. Constant executed a written assignment of said policy, absolute in form, in which assignment the defendant, Marie M. Constant joined, to Albert Barnett Klepper.

On the same day, February 8, 1956 the said Albert Barnett Klepper executed and delivered to the said Menander T. Constant and Marie M. Constant a written statement in which he acknowledged that the assignment of the above mentioned policy was made to him in trust to secure the payment of the above mentioned first mortgage to Edward Schnur and the above mentioned second mortgage to Abraham and Tillie Weiner. (See copy of same in Appendix.)

On May 22, 1956, Elberon Estates, Inc. being indebted to the defendant, Tanner Associates, Inc. in the sum of $12,000.00 executed and delivered to Tanner Associates, Inc., to secure such debt, a third mortgage on the above mentioned property in Ocean Township, Monmouth County, New Jersey. The said Menander T. Constant and the said Marie M. Constant personally guaranteed payment of the said debt to Tanner Associates, Inc.

On September 27, 1957 the insured, Menander T. Constant died domiciled in New Jersey and hopelessly insol-

vent, and the face amount of said insurance policy became fully due and payable.

On October 9, 1957 the defendant, Tanner Associates, Inc., in order to prevent its third mortgage interest on the above mentioned property from being foreclosed, in consideration of the sum of $8,225.83 took an assignment of the bond and mortgage held by the said Abraham Weiner and Tillie Weiner, together with an assignment of all the right, title and interest of the said Abraham Weiner and Tillie Weiner in and to the proceeds of the above mentioned insurance policy.

The defendant, Albert Barnett Klepper, is a member of the New York Bar and together with Andrew Dritsas, Esq. of the New York Bar (who appeared for Schnur in the present action in the United States District Court) represented the defendant, Edward Schnur, and the aforementioned Abraham Weiner and Tillie Weiner, and others in their various transactions with the decedent, Menander T. Constant, and the defendant, Marie M. Constant and the corporations controlled by them.

After the death of the said Menander T. Constant, the said Albert Klepper stated, in the presence of numerous witnesses, that he did not propose to disburse the proceeds of the said insurance policy in accordance with the terms of the trust on which the policy was assigned to him but that he intended to distribute them to various unsecured creditors of the decedent who were clients of his.

On October 10, 1957, to forestall such violation of trust by the defendant, Albert Barnett Klepper, this defendant directly made demand upon the plaintiff, The Manufacturers Life Insurance Company, for the payment of the sum of $8,225.83 representing its interests from the proceeds of such policy.

Subsequently, on November 1, 1957 the defendant, Albert Barnett Klepper, commenced an attachment action in

the Supreme Court of New York, Kings County, with the objective of securing the proceeds of the policy and distributing them in a manner violative of his trust.

On November 19, 1957 the District Court of New Jersey restrained the defendant Klepper from prosecuting the pending attachment action in the Supreme Court of the State of New York.

On December 9, 1957 the District Court of New Jersey permanently enjoined the prosecution of the attachment action in New York and directed interpleader.

During the argument on the rule to show cause before the District Court the defendants, Klepper, Schnur and Constant offered to pay to this defendant, Tanner Associates, Inc., that portion of the insurance proceeds which it claimed but only on condition that it assign the original Weiner mortgage to the defendant Marie M. Constant. This defendant refused such offer on these grounds: (1) It denies that the defendant, Marie M. Constant, would be the proper party to receive such assignment in the event of such payment to it on the ground that whatever interest she had in such policy as revocable beneficiary terminated when the decedent revoked her appointment as beneficiary and substituted the defendant, Edward Schnur, in her stead, and when the assignment, absolute in form but subject to the trust agreement, was made to Klepper. The proper party to receive such assignment in the event of payment to this defendant would be the Estate of Menander T. Constant; (2) it has good reason to believe that such offer was made as a result of collusion between the said defendants with the object of prejudicing this defendant in its attempts to collect the moneys due to it from the estate of the said Menander T. Constant, the defendant, Marie M. Constant and Elberon Estates, Inc.; (3) this defendant claims an equity to see that the proceeds of such policy are paid to those who are equitably entitled

to the same. The defendant, Albert Barnett Klepper, has absolutely no beneficial interest in the proceeds of the policy and his objective in securing them is to use them to pay off the claims of other unsecured creditors of the decedent, Menander T. Constant, and the defendant, Marie M. Constant, who are clients of his, to the damage of this defendant.

The value of the above mentioned property in Ocean Township, New Jersey, is clearly insufficient to satisfy the liens of the aforesaid three mortgages thereon and the accumulated real property taxes.

This defendant reserves the right to make a motion, on the day set for the oral argument of ths appeal, to expunge the affidavit of Nathaniel W. Franzblau, which is set forth on page 11a of the Appellants' Appendix, from the record of this case on the ground that this defendant never received a copy of the same and, consequently, never had an opportunity to answer it. It was filed with the District Court without this defendant's knowledge.

ARGUMENT

POINT I

The District Court properly assumed jurisdiction herein since the State court action was not *in rem* but *in personam*.

The action which the defendant-appellant, Klepper, brought in the Supreme Court of New York against the plantiff herein, The Manufacturers Life Insurance Company, was strictly for a money judgment. He sought, as assignee of the policy on the life of Menander T. Constant, to collect the proceeds of the policy then due. The insurance company was the only defendant named in the cause. No attempt was made to make Edward Schnur, Marie M. Constant or this defendant parties to that action. The fact that, since The Manufacturers Life Insur-

ance Company was not a resident of New York, the defendant-appellant, Klepper, was obliged to proceed against it by process of attachment, did not convert this *in personam* action for a money judgment into an action *in rem*. As was said by the Supreme Court of the United States in *Freeman* v. *Alderson*, 119 U. S. 185:

> "There is a large class of cases which are not strictly actions in rem but are frequently spoken of as actions quasi in rem because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are the actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the State and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things from actions which are strictly in rem in that the interest of the defendant is alone sought to be affected, that citation to him is required and that judgment therein is only conclusive between the parties."

In *National Fire Insurance Company* v. *Sanders et al.*, 38 F. 2d 212 (5th Cir. 1930) the Court of Appeals was called upon to consider the propriety of the judgment of the Texas District Court dismissing the insurance company's complaints in interpleader where, prior to the institution of the interpleader suit, one of the defendants had commenced an action against its co-defendant, Sanders, by an attachment in an Illinois court, garnisheeing the proceeds of the insurance policies upon which was founded the interpleader action. The District Court held that the Illinois court had acquired jurisdiction of the *res*

by the attachment action and that, consequently, the Federal court was without jurisdiction to afford the plaintiff any relief through interpleader. In reversing this judgment of the District Court, the Court of Appeals said:

> "If the Illinois suit were truly an action in rem it would be different as its judgment would conclude the world, but an attachment through garnishment is only quasi in rem. What was attached was a credit and not any particular fund or tangible property of any kind. The suit against Sanders was in personam though quasi in rem to the extent that the judgment could be satisfied only out of the property attached. Any judgment to be rendered against appellants (insurance companies) as garnishees would be a personal judgment to be satisfied out of any of their property and not out of any particular fund or segregated property."

To the same effect see: *Metropolitan Life Insurance Company* v. *Skov*, 45 F. Supp. 140 (Dist. Ct. of Ore., 1942), and *Cramer* v. *Phoenix Mutual Life Insurance Company*, 91 F. 2d 141 (8 Cir. 1937). The facts in this latter case bear a striking similarity to the facts in the case at bar.

In the light of these authorities it is idle for the appellants to contend that the defendant-appellant's, Klepper's action for a money judgment against the plaintiff herein in the New York court assumed the character of an *in rem* action because it was commenced by attachment. Any judgment which he might recover in that action against the plaintiff-appellee herein would be binding only on such plaintiff-appellee and then only to the extent of the funds in the hands of the garnishee belonging to the plaintiff-appellee. It would have no effect whatever on the claims of the other defendants herein against the proceeds of this policy. They would be free to proceed in the New Jersey courts to assert their claims and the plaintiff-appellee

would thereby be exposed to a double liability on the one obligation, a situation which the Federal Interpleader Act was expressly designed to correct.

POINT II

The State court of New York could not afford ample relief to the parties.

Assuming, *arguendo*, that the defendant-appellant's, Klepper's action for a money judgment against the plaintiff-appellee were, through a counterclaim by the plaintiff-appellee, converted into an interpleader action, still the New York court would be in no position to afford complete relief, for in New York, as elsewhere, an interpleader action is held to be *in personam* and not *in rem*.

In *Hanna* v. *Stedman*, 230 N. Y. 326, 130 N. E. 566—the New York Court of Appeals was called upon to judge the validity of a judgment in an interpleader action involving the proceeds of an insurance policy, where one of the defendants resided in New York and the other defendants were non-residents. The non-residents were served by publication but did not appear. In holding such judgment not binding on the non-resident defendants the Court said:

> "An action or proceeding in rem has for its subject specific property which is within the jurisdiction and control of the Court to which application for relief is made. The action proceeds against specific property and its object is to have the Court define the rights therein of various and conflicting claimants. Jurisdictional control of the property affords the basis for service beyond its jurisdiction upon those who may be interested in its disposition. The result of such an action is a judgment which operates upon the property and which has no element of personal claim or personal liability. There is no authority, so far as we are aware, holding that an action of interpleader is

one in rem but exactly the opposite view has been entertained. N. Y. Life Insurance Co. v. Dunlevy, 241 U. S. 518."

Since the New York Court lacks the power to compel the claimants herein, who are residents of New Jersey, to submit to its jurisdiction, any judgment which it would render in the premises would not be binding upon them.

POINT III

Under the Federal Interpleader Act the District Court of New Jersey has jurisdiction over the defendants-appellants who are New York residents.

One does not have to look any further than the terms of the statute itself to see that the District Court of New Jersey had ample power to subject the defendants-appellants to its jurisdiction.

Title 28, Sec. 2361 of the U.S.C.A., states:

"In any civil action of interpleader or in the nature of interpleader, under Sec. 1335 a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or U. S. Court affecting the property, instrument or obligation involved in the interpleader action until further order of the Court. Such process and order shall be returnable at such time as the Court or judge thereof directs and shall be addressed to and served by the United States marshalls for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the Plaintiff from further liability, make the injunction permanent and make all appropriate orders to enforce its judgment." (June 25, 1948, C. 646, ≡1, 62 Stat. 970; May 24, 1949, C. 139, ≡117, 63 Stat. 105.)

Title 28, Sec. 1397 of the U.S.C.A., states:

> "Any civil action of interpleader or in the nature of interpleader under Sec. 1335 of this Title may be brought in the Judicial District in which one or more of the claimants reside." (June 25, 1948, C. 646, #1, 62 Stat. 936.)

Were the words of the statutes not sufficiently explicit and convincing on this question, the numerous decisions affirming the Federal Courts' jurisdiction in this situation can leave no doubt as to its existence. *Metropolitan Life Insurance Company* v. *Skov, supra; Treinies* v. *Sunshine Mining Company*, 308 U. S. 66 (1939); *Cramer* v. *Phoenix Mut. Life Insurance Company*, 91 F. 2d 141 (8 Cir. 1937), cert. den. 302 U. S. 739, 778; *Maryland Casualty Co.* v. *Glassell-Taylor and Robinson*, 156 F. 2d 519 (5 Cir. 1946); *Dugas* v. *American Surety Co.*, 300 U. S. 414 (1937).

In the light of the statutes and the decisions defining jurisdiction in interpleader, it is plain that the jurisdiction of the court extends anywhere in the United States. Consequently, the defendants-appellants' objection to the jurisdiction of the District Court is nothing less than frivolous.

POINT IV

The District Court did not commit error in disregarding the objections of three of the four defendants to the assumption of jurisdiction, although the said three defendants agreed to make a conditional payment in full to the fourth defendant, who refused to accept the same.

The objectives which were sought through the enactment of the Federal Interpleader Act were succinctly stated by Judge Maris in *Metropolitan Life Insurance Co.* v. *Segaritis*, 20 Fed. Supp. 739, 741 (E. D. Pa. 1937):

> "The purpose of the statute is to give the stakeholder protection where adverse claimants reside in different states and to protect the stakeholder as much from the hazards of costs of defending twice as from the danger of double liability."

It is clear, therefore, that sympathy for the stakeholder was the primary objective in mind in the enactment of this legislation. Now, prescinding for the moment from a consideration of the qualified nature of the offer made to this defendant, would not the District Court be flouting the design of Congress and the beneficient purposes of this statute were it to heed the pleas of the defendants-appellants and refuse jursdiction of this cause? The innocent stakeholder, the plaintiff-appellee herein, who cares nothing at all about the contentions of the various claimants to the fund, would, because of these contentions, find itself deprived of the protection of the statute. For, once having declined jurisdiction, the District Court would be powerless to prevent this defendant from bringing an action on its claim in the New Jersey courts at the same time that the plaintiff-appellee is litigating the defendants-appellants claim to the fund in the New York courts. What, then, will preserve the stakeholder from the hazards of double liability on the one obligation? Or the vexation and expense of litigating these various claims to the one fund?

Indeed, where the jurisdictional facts appear, *i.e.* obligation of $500.00 or more, two or more adverse claimants, deposit of money by stakeholder in court, etc., the Federal District Court is under a duty to assume jurisdiction of the controversy. Certainly, in a case such as the facts reveal this to be, it has no discretion in the matter. It must assume jurisdiction.

The case of *Maryland Casualty Co.* v. *Glassell-Taylor & Robinson*, 156 F. 2d 519 (5 Cir. 1946) discussed the question of the duty of the Court where the jurisdictional facts

appeared. That was an action in the nature of interpleader by a surety company on contractor's performance bond against obligee and other persons making claims thereunder. Before the commencement of the Federal Interpleader action a concursus proceeding had been commenced in the Louisiana court involving the same parties and the same obligation. In reversing the District Court's judgment dismissing the complaint because of the prior concursus proceeding, the Court of Appeals said:

> "The Federal Interpleader Statutes and Rule 22, Federal Rules of Civil Procedure, were not designed merely to prevent a multiplicity of suits and to protect the stakeholder from multiple liability but they were also intended to require all interested parties to come in and set up their claims in one case, so as to prevent it only from being a race to the swift where a creditor who had a large claim and the means by which to prosecute it might promptly secure judgment against the stakeholder in another state and by a prior execution consume the entire amount of the bond, to the exclusion and detriment of creditors having small claims or inadequate means by which to collect them. The Interpleader Statute was also designed to afford a means of process by which claimants to a fund, who live in other states, may be called and required to litigate in one court to the end that all claimants to the fund, as well as the holder of the fund, may be given protection.
>
> "We consider it important that the usefulness of the statutory remedy of Interpleader, which has been greatly enlarged by the Interpleader Act of 1936 and by Rule 22 of the Federal Rules of Civil Procedure, should not be impaired by narrow and restrictive rulings. In such cases where jurisdiction clearly appears Federal Districts Courts do not have the right to decline to exercise that jurisdiction in litigation involv-

ing no important question of the public policy of the State. (Citing McClellan v. Carland, 217 U. S. 268, at Page 281; Chicot County v. Sherwood, 148 U. S. 529; Meredith v. Winter Haven, 320 U. S. 228.)"

Were not the foregoing considerations determinative of the Court's duty in the premises, the fact that the offer to pay this defendant's claim was conditioned on this defendant's assigning its interest in the bond and second mortgage to the defendant, Marie M. Constant, removes any possible vestige of doubt on this question. This defendant very properly rejected such a condition because it believes that such offer was the result of collusion between the other defendants with the objective of prejudicing this defendant in its attempts to collect the moneys due to it on its third mortgage indebtedness. Were this defendant to accept such an offer the defendant-appellant, Klepper, a New York resident, would have in his hands better than $16,000.00 which he proposes to distribute to various unsecured creditors of the late Menander T. Constant who are clients of his and also residents of New York. The other defendant-appellant, Schnur, has already commenced a foreclosure of his first mortgage on the Ocean Township property with the objective of wiping out this defendant's liens on the same and, at the same time, for all practical purposes, extinguish the debt represented by this defendant's third mortgage lien, for the estate of Menander T. Constant is hopelessly insolvent. This defendant claims the equitable right, under the familiar rule of marshalling assets, to see that the proceeds of the insurance policy are paid to those creditors who, in equity, are entitled to them. It does not intend to permit the defendant-appellant, Klepper, to dispose of these funds in a manner to suit himself and in violation of his trust and it is confident that no court will compel it to do so.

This defendant further objected to the offer of payment on the ground that the defendant, Marie M. Constant, was

not entitled in law or equity to such assignment in the event of payment. Whatever interest she had in such policy as revocable beneficiary terminated when the decedent exercised his right to revoke her appointment as beneficiary and substituted the defendant-appellant, Schnur, in her stead "as mortgagee" and when the assignment, absolute in form but subject to the trust agreement, was made to the defendant-appellant, Klepper, it is the contention of this defendant that the proper party to receive such assignment in the event of payment would be the Estate of Menander T. Constant.

POINT V

(Answering Appellants' Argument)

It is impossible to avoid impugning the good faith of the defendants-appellants in pressing this appeal after you have read their brief. Not only did they deliberately omit to reproduce, in their appendix, the letter from the defendant-appellant, Klepper, to the Constants, setting forth the fiduciary nature of the assignment of the policy to the said Klepper, which letter was attached to and expressly made part of the affidavit of Alexander J. Alexander, Vice-President of this defendant corporation, filed in this cause and which they otherwise reproduced, but they have not cited one case which can truthfully be said to support the principles and rules of law which they are asking this Court to adopt in its decision in this case.

In their brief (page 4) they cite *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118 (1941) as authority for the proposition that "where a State court first acquires control of the *res*, the Federal Courts are disabled from exercising any power over it by injunction or otherwise." The question there presented to the Court and answered was whether a federal court could enjoin a proceeding in *personam* in a State court on the ground that the claim in

controversy had been previously adjudicated by the federal court. Not only is this case no authority for the proposition cited by appellants but the Supreme Court, in the course of its opinion, (pp. 133-134) expressly recognized the fact that, in interpleader actions, the federal courts may issue injunctions enjoining defendants "from instituting or prosecuting any suit or proceeding in any State court or in any other federal court".

In this connection *Palmer* v. *Texas*, 212 U. S. 118 (1908) is also cited; but this case was not an interpleader action and it was decided years before the passage of the Federal Interpleader Act.

Then the case of *Mosely* v. *Sunshine Biscuits*, 170 Fed. Supp. 164 (W. D. Mo. 1952) is cited on page 4 of their brief for the proposition that, in an interpleader action, the Federal Court in one State has no jurisdiction over a defendant in another State unless such defendant waives the defense of lack of jurisdiction. Here, again, is another instance of a case cited with intent to mislead. This case, an interpleader action, was decided on the ground that neither of the defendants (claimants) was a resident of the district where the suit was filed. Since by the statute conferring jurisdiction (Sec. 1397, Title 28 U. S. C. A.) the Congress put the venue of such cases "in the judicial district in which one or more of the claimants reside" the Court dismissed the bill because one of the defendants refused to waive this jurisdictional requirement by submitting himself to the jurisdiction of the Court. The defendants-appellants have artfully neglected to call to this Court's attention that, upon rehearing (reported in 110 Fed. Supp. 157) when it appeared that one of the defendants, Sunshine Biscuits, Inc. was licensed to do business in Missouri and, consequently, was a resident of Missouri for purposes of venue under the Interpleader Act, the Court reversed its judgment, reinstated the complaint and took jurisdiction of the action.

Then, on page 5 of their brief, *Hagan* (miscited Hogan) v. *Central Ave. Dairy, Inc.*, 180 F. 2d 502 (9 Cir. 1950) is cited also to support the proposition that an out-of-state defendant must waive the defense of jurisdiction over his person in order to give the Federal court jurisdiction in an interpleader action, and, in addition, as authority for the proposition that, in interpleader actions, the process of the District Court does not run countrywide. This case is authority in no sense for either of these propositions. In fact, it is authority for the very reverse of these propositions. Therein, a Title Insurance and Trust Company brought an interpleader action against Hagan and the Dairy Company in the Federal Court in Southern California on a dispute arising out of an escrow transaction. Service was made upon the Dairy Company in Arizona but it filed no answer nor made any appearance in the interpleader suit. Hagan filed a cross-claim against Dairy Company asking for money damages and alleging that the claim for them grew out of the same contract which was the subject matter of the escrow deposit. Central Dairy appeared specially and objected to the Court's jurisdiction over it with regard to this cross-claim. The District Court dismissed the cross-claim and an appeal was taken. The Court of Appeals held that the cross-claim could not be maintained, saying:

> "We think that the District Court of California did not have personal jurisdiction over the absent non-consenting Arizona corporation except to the extent of that corporation's interest in the escrow fund. That the Court had jurisdiction that far is clear from the statute. * * * The absentee defendant was not before the Court here. The Court could adjudicate rights in the fund but could affect no other interest of the absentee."

Nor is the case of *Flanagan* v. *Marvel*, 94 Fed. Supp. 145 (D. Minn. 1950)—cited on page 4 of their brief, of any

help to the defendants-appellants on this question of jurisdiction. Therein the proceeding in the State Court sought to be enjoined was concededly in *rem* and the statutes of Minnesota gave the State Court ample power to grant full and complete relief to all the parties having an interest in the *res*. The case involved the settlement and distribution of an estate and it requires no extensive citation of authority to show that such a proceeding is strictly in *rem*. See Corpus Juris, Title, Executors and Administrators, Vol. 23, Sec. 27 and *Michigan Trust Company* v. *Ferry*, 175 Fed. 166 (rev. on other grounds 228 U. S. 346).

CONCLUSION

In the light of all the facts in this case and in the failure of the defendants-appellants to cite any reliable authority whatever to support their challenge to the jurisdiction of the District Court, it is respectfully urged that the order under appeal should be affirmed and, in view of the obviously frivolous character of this appeal, with costs and counsel fees to this defendant to be paid by the defendants-appellants personally and not out of the fund.

Respectfully submitted,

ABE A. SCHULTZ,
Attorney and Counsel for Defendant,
Tanner Associates, Inc.

EUGENE P. KENNY,
On the Brief.

APPENDIX

Letter of February 8, 1956, Annexed to Affidavit Submitted by Defendant Tanner Associates, Inc.

February 8, 1956

Mr. Menander T. Constant
79 Lincoln Avenue
Elberon, New Jersey.

Dear Mr. Constant:

I have this day received an assignment of policy and the appointment of beneficiary, together with the original life insurance policy issued by the Manufacturers Life Insurance Company, policy #1,254,339, which I will hold in escrow until the repayment in full of a first mortgage to Edward Schnur and a second mortgage to Abraham and Tillie Weiner.

It being understood that said policy together with the assignment and appointment of beneficiary will be returned to you upon full payment of both of said mortgages.

In the event that there is a default under either of said mortgages, then and in that event the proceeds of said insurance policy shall be used in payment of the balance that may be then due under said mortgages; and, any other balance then remaining shall be delivered to your estate in full.

It being further understood that in the event that you fail to make any premium payment, that I may on behalf of either or both of said mortgagees, make said payment and hold you responsible therefor.

Very truly yours,

/s/ Albert Barnett Klepper
Albert Barnett Klepper

Accepted

/s/ Menander T. Constant
Menander T. Constant

/s/ Marie M. Constant
Marie M. Constant